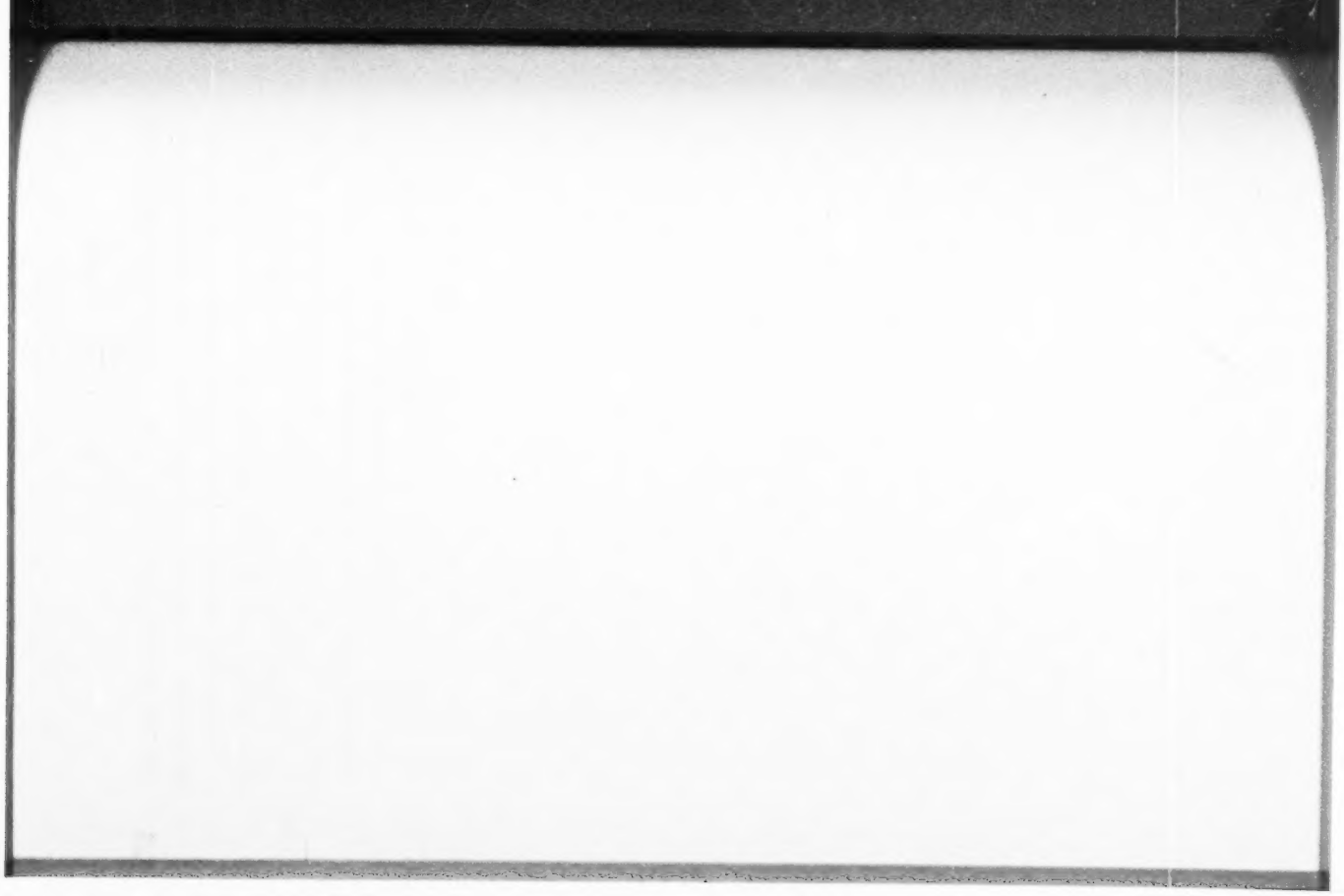

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1904.

No. 42.

OTTO OLSEN, PLAINTIFF IN ERROR,

vs.

A. D. SMITH, L. LUTH, L. BEST, ET AL.,
DEFENDANTS IN ERROR.

In Error to the Court of Civil Appeals, Fourth Judicial District of Texas.

JAMES B. & CHARLES J. STOBBS,
Counsel for Defendants in Error.

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STATEMENT.

This suit was brought December 4, 1900, by defendants in error, who were the pilots at the port of Galveston, appointed by the Governor of Texas and qualified in accordance with the pilot laws of that State, and who claimed the exclusive right to pilot in and out of the port of Galveston vessels bound to and from foreign ports. They alleged that plaintiff in error was offering his services and acting as a pilot for such vessels without right or authority so to do, which action interfered with the performance of their official duties and prevented them from earning the compensation allowed by law, and was a practical denial of the right of the State of Texas to enact and enforce a pilotage system, to designate efficient and responsible pilots, and to regulate the pilotage service in the interest of commerce and with a view to the safety of life and property.

An injunction was asked to restrain Olsen from piloting or attempting to pilot vessels engaged in foreign commerce. (Tr., 1-3.)

Demurrers to the petition questioned the validity of the pilot laws of the State of Texas upon grounds hereinafter stated. The answer averred that plaintiff in error was a citizen of the United States and of Texas, and had resided more than ten years at the port of Galveston; that he was a skilled seaman and a pilot of coastwise steam vessels by virtue of a license under the laws of the United States. That he was familiar with the harbor and was qualified to act as a branch pilot, but that the board of pilot commissioners of the port had refused to examine him as to his qualifications, for the reason that he had not served as a deputy pilot for the term of one year. He admitted that each of the defendants in error was a branch pilot, and, as such, was authorized to offer his services as a pilot to any vessel entering or leaving the port of Galveston, but complained that petitioners had wrongfully refused to appoint him a deputy and thus put him in order for appointment as a pilot.

Further, that they had associated themselves as partners to maintain the rates of pilotage and counteract free competition in such service, and that such association was, therefore, in restraint of trade.

He declared that the only vessels which he had served or offered to serve as pilot were British vessels, and that under a treaty between the United States and Great Britain he had the right to pilot such vessels in and out of the harbor. Also, that defendants in error could not lawfully take from him his right to enjoy the liberty to pursue his calling, profession or trade as a pilot.

To this answer defendants in error demurred, and upon the hearing, November 11, 1901, their demurrers were sustained, and those of plaintiff in error were overruled, and the former

were adjudged entitled to the relief prayed for and the temporary injunction was made permanent. (Tr. 8).

The Court of Civil Appeals for the Fourth Supreme Judicial District of Texas, on April 23, 1902, affirmed the judgment of the District Court, after modifying it in a respect immaterial to this proceeding. (Tr. 14-20).

June 25, 1902, the application of Olsen to the Supreme Court of the State of Texas for a writ of error was refused. (Tr. 24).

This was an approval by the final tribunal of Texas of the conclusion of the appellate court.

The case was thereafter brought to this court. (Tr. 25-29).

As will be seen, the validity of the pilot laws of the State of Texas is involved in this case. They are assailed upon several grounds, namely:

1. That the exemption therein of certain vessels from compulsory pilotage does not include all coastwise steam vessels, as provided by the act of Congress, and that, therefore, the entire State law is void.

2. That British vessels, the only ones served by Olsen, are exempt under a treaty from compulsory pilotage and as the Texas statutes do not recognize such exemption, they are, for that reason, void.

3. That the partnership between defendants in error, and their refusal to appoint Olsen as deputy, are in restraint of trade and in violation of the anti-trust laws of the United States.

4. That the Texas law is repugnant to the first section of the fourteenth amendment of the Federal Constitution in that it denies to plaintiff in error the right to pursue the occupation of pilot without prior service as a deputy and appointment by the Governor in pursuance of the State statute. (Tr. 30).

We will discuss these objections in the order in which they appear in the brief of plaintiff in error.

The statutes are copied in the brief of the other side and are

synopsized in Judge Gill's opinion in the Petterson case appearing in the appendix.

Do the exemptions in one article of the statutes annul the others?

The first assignment charges that the Texas law is invalid because it exempts certain vessels from its provisions. These exceptions are of all vessels of twenty tons and under; of all owned and registered in the State of Texas when arriving from or departing to a port of the State; of all vessels of seventy-five tons and under, owned and licensed for the coasting trade in any port of the United States when bound to or from any port of the State, and of all vessels of seventy-five tons and under owned and licensed in the State when arriving from or departing to any part of the United States. (Brief of plaintiff in error, 6, 7, 8, 9).

The foregoing classes of vessels are free from any charge of pilotage, except for actual service, whereas the act of Congress of 1871, U. S. Rev. Stat., Sec. 4444, only exempts coastwise steam vessels from taking a State pilot. The exemptions of the Texas statute are not confined to steam vessels, but are limited to those of a small tonnage, whether steam or sail.

Replying to the argument upon this point we quote from the opinion of the Court of Appeals in this case, delivered by Chief Justice James. (Tr., 16).

"There can be no question that the acts of Congress on the subject are paramount and nullify at least so much of our statutes as are inconsistent with them. Appellant insists that the several provisions of our pilot law constitute one entire scheme and the intent of the legislature to exempt Texas vessels engaged in strictly State commerce, and to include all coastwise vessels over seventy-five tons burden, are so interwoven and connected that it is impossible to separate them, or to declare that the legislature would have enacted a law at all if they had in view the illegality of such particular exemption and inclusion. That the objection-

able provisions are separable from the rest of the provisions seems to us too plain for discussion.

"The invalid provisions relate only to coastwise vessels, as distinguished from foreign ones; therefore, the subject matters are distinct as between these classes of vessels. It is our opinion that these minor provisions with respect to certain coastwise vessels were not of prime importance in the mind of the legislature, in view of the settled policy of this State since 1846 to establish pilot regulations for its harbors. We, therefore, can not accede to the proposition that it is evident or even reasonably inferable that the legislature would not have enacted the provisions in reference to foreign vessels alone.

"The Alameda, 32 Fed., 333.

"Reagan vs. Farmers' Loan & Trust Co., 154 U. S., 362.

"Tel. Co. vs. The State of Texas, 62 Texas, 630."

This was approved by the Supreme Court of Texas.

In Reagan vs. Farmers' Loan & Trust Co., 154 U. S., 362; 38 L. E., 1023, cited by the Court of Appeals, this Court, writing through Mr. Justice Brewer, announces that "it is familiar law that one section or part of an act may be invalid without affecting the validity of the remaining portion of the statute. Any independent provision may be thus dropped out if that which is left is fully operative as a law, unless it is evident from a consideration of all the sections that the legislature would not have enacted that which is within independently of that beyond its power."

With this rule in mind, we have no difficulty in concluding that the legislature of Texas would have established pilot regulations requiring, among other things, that all vessels engaged in the foreign trade, which are generally of large size and draft, should avail themselves of pilots familiar with the bars, shoals, channels, and harbor in entering or leaving port, whether coastwise steam vessels were exempted by Congress or not, and that such pilots

should be appointed and controlled by the State, where Congress had not provided otherwise.

In fact, when these statutes were first passed in 1846 the larger part of the coasters were of small burthen, and the law bears the evidence of the disposition on the part of its framers to leave it optional with the entire coasting trade to accept the services of the port pilots. It is not unreasonable to suppose that the exemptions would have been extended at a later date to include other coasters if the matter had been called to the attention of the legislature.

U. S. Rev. Stat., Sec. 4444, only goes a step further, applying this option to all steam vessels in the coastwise trade. The allowed and the prohibited paragraphs of the State law are plainly separable and distinct, and it is only when all the provisions are so connected in meaning and interdependent that it cannot be presumed that the legislature would have passed one without the other that the entire statute will be disregarded.

Keokuk N. L. P. Co. vs. Keokuk, 95 U. S., 89; 24 L. E., 381.

Spraigue vs. Thompson, 118 U. S., 90; 30 L. E., 115, relied upon by plaintiff in error, was a case where pilotage was claimed under a Georgia statute against a coastwise vessel. It has no application to a vessel in the foreign trade. This was expressly decided by Mr. Justice Field on circuit after he had taken part in the decision of Spraigue vs. Thompson.

It was urged in the Alameda, 32 Fed., 333, that, as the California code discriminated with respect to coasting vessels, the entire pilot law of that State was void, because the discriminations were within the prohibition of the Federal statute. Judge Field thus demonstrates the unsoundness of the claim:

"It does not seem to me to be a reasonable inference that, because an exemption was thus made by the legislature in favor of certain coasting vessels between the ports of the State and between its principal port and ports on the coast in Oregon,

Washington and Alaska, it would not have allowed half pilotage in any case, even where the vessel to which the service of a pilot were tendered was coming from a foreign port, had not this exemption of coasting vessels from such charges been allowed. There is no such necessary connection between the two things as would justify the inference that the charge would not have been allowed in the one case if the exemption were not permitted in the other.

"The Federal statute prohibits regulations by any State making a discrimination in the rates of pilotage or half pilotage between certain vessels engaged in the coasting trade, or against vessels propelled in whole or in part by steam, or against National vessels and it abrogates all existing regulations thus discriminating. But it has no further operation; it in no respect impinges upon any other regulation, or touches the general system of pilotage or half pilotage, with respect to vessels engaged in foreign commerce. The prohibited discrimination, if previously made, is abrogated; if subsequently made, it is inoperative to defeat regulations otherwise valid.

"Discriminations in rates of pilotage in favor of certain vessels engaged in the coasting trade are, by their terms, necessarily limited, and could, therefore, never have been designed to affect the pilotage or half pilotage of vessels engaged in foreign commerce. The discrimination as to coasting vessels being invalid, section 2466 stands, as respects other vessels, in full force. Whether the coasting vessels are, by the invalidity of the discrimination as to them, brought under the operation of section 2466 is a question not necessary to determine. It may be said that the discrimination indicates the intent of the legislature that such vessels should be exempt from half pilotage; but it may be also said that it is to be presumed that the legislature only intended the discrimination in case it could be lawfully made. We should hesitate to attribute to it a designed disregard of the

Federal statute. But, as said above, the question is not before us for decision. The case is essentially different from Spraigue vs. Thompson, 118 U. S., 90. There it was sought to charge a coasting vessel which was (not) excepted from pilot charges by the Code of Georgia; here it is sought to except from such charges a vessel engaged in foreign commerce, because of an exemption by the Code of California in favor of certain coasting vessels—an exemption contained in an independent section."

The opinion of Judge Hoffman in the lower court, sustained on appeal, is of similar import. The Alameda, 31 Fed., 366.

The Undaunted, 37 Fed., 662, also cited by defendant, is not inconsistent with the Alameda. The Undaunted was an American vessel which refused to employ a pilot when leaving the port of San Francisco for the port of New York, and it was held that the statute of California allowing half pilotage in such a case was void, because in conflict with section 4237 of the Revised Statutes of the United States, which provides that "No regulations or provisions shall be adopted by any State which shall make any discrimination in the rate of pilotage or half pilotage between vessels sailing between the ports of one State and vessels sailing between ports of different States and all existing regulations or provisions making any such discrimination are annulled and abrogated."

This decision was by Judge Sawyer of the United States Circuit Court of the Northern District of California. The previous judgment in the Alameda case was by the same court, Justice Field presiding. Judge Sawyer held that the Undaunted, being a vessel bound from one port in the United States to another, was not liable for half pilotage, under the California statute, because the latter was contrary to the act of Congress in that respect, but it is not intimated that the conclusion reached by Judge Field upholding that part of the California statute which related to vessels engaged in foreign commerce was not sound.

There is a clear difference between the cases, and Judge Sawyer, it seems to the writer, impliedly admits that if the ship had been bound to a foreign port, it would have owed half pilotage. He says: "It is claimed, however, that, as this vessel sails around Cape Horn to New York, and may touch at some foreign port on the way, it is not 'coasting' between the two ports of San Francisco and New York. Should this be so, the provision of the Revised Statutes does not say 'coasting,' but 'vessels sailing' between the ports of the States. This vessel is clearly within the terms of the provision." While it was not necessary to go further, the inference from the above is that if the ship had been bound to a foreign port, it would not have been exempt.

Again, as pointed out in the Alameda case, the exemption of the statute was contained in an independent section, as is the Texas exemption, and it cannot be doubted that the legislature of Texas would have required all vessels in the foreign trade to comply with the State pilot laws, or pay half pilotage, whether such requirement was or was not intended to apply to those in the domestic trade.

In other words, the State statute, though invalid as to article 3801, making certain exceptions, is operative as to the remainder, because the latter would obviously have been enacted independently of the exceptions.

Plaintiff in error referred, in the lower court, to Western U. T. Co. vs. The State of Texas, 62, Texas, 630, which clearly supports our view. Judge Stayton adopts this language of Judge Cooley (page 634): "If when the unconstitutional portion is stricken out, and that which remains is complete in itself and capable of being executed in accordance with the apparent legislative intent, wholly independent of that which was rejected, it must stand."

We ask the court to consider also whether the question thus presented can be raised in this case. The only invalidity of our

statute is an attempted discrimination between different coasters. The petition refers only to vessels in the foreign trade. They cannot be injured or affected by an illegal discrimination between coasting vessels. They are merely subjected to a just and necessary charge, which, if the court should declare it to be invalid, because of the regulation regarding coastwise vessels, the legislature could and doubtless would again establish, unaccompanied by the exemptions.

The objectionable provisions are not so connected with the general scope of the law as to make it impossible, if they are stricken out, to give effect to what appears to have been the intent of the legislature, and there can be no question in the case before us that the legislature intended to subject foreign vessels and those engaged in foreign trade to this charge. The invalidity of a part of the State statute with respect to coasters should not and does not annul the rest of the statute, which, it is evident, the legislature intended as the law to be applied to foreign shipping, whether domestic vessels should or should not be subject to pilot charges.

In Loeb vs. Trustees of Columbia Township, 179 U. S., 490; 45 L. E., 290, the Supreme Court observes:

"The point is not whether the parts are contained in the same section, for the distribution into sections is purely artificial, but whether they are essentially and inseparably connected in substance,—whether the provisions are so interdependent that one cannot operate without the other."

Clearly, the rule requiring ships in the foreign trade to take a pilot, or pay half pilotage, can and was intended to be applicable to such vessels, in any event, regardless of the rules then or thereafter prescribed for domestic or coasting craft. The State exemption of such is broad, including many that the Federal act omits, and it is apparent that the legislature would not have hesitated,

if called to its attention, to have made the State exemptions or options conform to the National.

Tiernan vs. Rinker, 102 U. S., 123; 26 L. E., 103; same case, 47 Tex., 393.

T. & P. Ry. Co. vs. Mahaffey, (T. C. A.) 10 T. C. R., 779.

All depends upon the intention of the legislature as shown by the general scope of the law.

Florida Central Ry. vs. Schutte, 103 U. S., 118; 26 L. E., 335.

It is only when the provisions of a statute are so mutually dependent upon each other as conditions, considerations or compensations for each other as to warrant the belief that they were intended as an entirety, and that the lawmakers would not have enacted any part without including all of it, that such statute will be declared wholly void, when a part of it is in conflict with the supreme law.

In Little Rock & Ft. S. R. Co. vs. Worthen, 120 U. S., 102; 30 L. E., 590, this court says: "It is only when different clauses of an act are so dependent upon each other that it is evident the legislature would not have enacted one of them without the other—*as when the two things provided are necessary parts of one system*—the whole act will fall with the invalidity of one clause. When there is no such connection and dependency, the act will stand, though different parts of it are rejected."

This court will accept the construction of the Texas courts in such cases as this.

Assuming that as an original question this court might class the Texas statute with that of Georgia, discussed in the case of Spraigue vs. Thompson, *supra*, we advance this proposition in the language of Mr. Justice Harlan, in giving this Court's opinion in Cargill Co. vs. Minnesota, 180 U. S., 466; 45 L. E., 626: "The questions just stated are questions of local law, and in determining whether the statute violates *any right secured by the Federal Constitution* we must, in the particulars named,

accept the interpretation put upon it by the State court." The italics are ours.

"In Tullis vs. Lake Erie & W. R. Co., 175 U. S., 348; 44 L. E., 192, the question was as to the constitutionality of a statute of Indiana relating to railroads and other corporations, except municipal corporations. The Supreme Court of that State held that the statute was capable of severance, and that its provisions as to railroads were not so connected in substance with the provisions relating to other corporations that their validity could not be separately determined. This court followed that view, declaring it to be an elementary rule that it should adopt 'the interpretation of a statute of a State affixed to it by the court of last resort thereof.'"

"See also Missouri P. R. Co. vs. Nebraska, 164 U. S., 403; 41 L. E., 489.

Chicago, M. & St. P. R. Co. vs. Minnesota, 134 U. S., 418; 33 L. E., 970.

St. L., I. M. & S. R. Co. vs. Paul, 173 U. S., 404; L. E., 746."

"Pursuant to this rule, and without expressing any opinion on the question, we assume that the provision requiring a license from any person, firm or corporation proposing to engage in the business described in the first section embraces the defendant company; that such provision may stand alone; and that its validity may be determined without reference to other provisions of the statute."

M., K. & T. Ry. vs. McCann, 174 U. S., 586; 43 L. E., 1097, and authorities there cited in Tullis vs. Lake Erie & W. Ry., 175 U. S., 348; 44 L. E., 195, in which Mr. Chief Justice Fuller, delivering the opinion of the court, declines to disregard the interpretation given to a State statute by the court of last resort of the State and, by an adverse construction, *to decide that the State law is repugnant to the Constitution of the United States.*

As to the Treaty:

Is the Texas statute in derogation of the treaty between this country and Great Britain of December 22, 1815? One of its stipulations is as follows:

"No higher or other duties or charges shall be imposed in any of the ports of the United States on British vessels than those payable in the same ports by vessels of the United States; nor in the ports of any of His Brittanic Majesty's territories in Europe on the vessels of the United States than shall be payable in the same ports on British vessels."

In response to this inquiry our Court of Civil Appeals expressed these views: (Trans. 17, 68 S. W., 320; 4 T. C. R., 982.)

"Defendant alleged that all vessels that he had piloted or tendered his services to pilot in or out of the harbor, are British vessels, and that by virtue of said treaty he has the right to do so. The position taken is that because certain United States vessels (coastwise vessels) are relieved, all British vessels are therefore exempt, whether coastwise or foreign. United States vessels engaged in foreign trade have never been relieved and are still subject to the pilot laws of this State, but, says appellant, British ships engaged in foreign trade are nevertheless not subject to them. The meaning of the treaty is evident, viz: That British vessels should have the same benefits accorded United States vessels at American ports, the same and no more or less, and that no discrimination should be made. In respect to British coastwise vessels they are exempt from our statute because United States coastwise ships have been exempted. The exemption has not been extended to American ships engaged in foreign commerce, and until this is done British vessels of the same character are equally subject to our statute."

This decision, like all of those in Texas involving our pilot system, has been approved by the Supreme Court of the State, which is the final tribunal. Under our statutes (R. S. Art. 943)

the refusal of the applications for writs of error, which occurred in those cases, is an approval by the Supreme Court of the conclusions of the intermediate court.

Brackenridge vs. Cobb, 85 Tex., 448.

A fair construction of the extract from the treaty would be that "no higher or other duties or charges shall be imposed in any of the ports of the United States on British vessels than those payable in the same ports by vessels of the United States" engaged in like service, because a vessel of the United States arriving from a foreign country would be amenable to the pilot laws of Texas, and, under the extract from the treaty given above, a British vessel would necessarily be in the same category. Otherwise, the latter would not be required to pay a pilot charge which the American vessel would have to bear. The plain and reasonable import of the treaty is that the vessels of both countries shall be upon an equal footing. The construction contended for by defendant would accomplish the opposite result and would mean an inequality and a discrimination.

When Congress, 1871 (U. S. R. S., Sec. 4444), declared that American steam vessels in the coasting trade should not be subject to the pilot laws of the various States, it did not exempt British vessels, unless, indeed, it could be shown that they were engaged in the coasting trade, and no other or different rights can be claimed for British vessels than those accorded American vessels under like conditions.

The contention that in all cases where American vessels are relieved from any duty or charge in a port of the United States, the same exemptions should extend to British vessels at that port is true, but defendant does not and cannot show that American vessels employed in commerce with foreign countries are exempt from such charges in Texas ports. The vessels of the two countries are upon a parity, as the treaties and laws have been under-

stood and applied for many years, and which construction is the only reasonable and just one.

Hunt vs. Card, 14 Pick., 135.

As to Monopoly:

Plaintiff in error, on page 13 of his brief, argues, in effect, that as his answer charges that the pilots have associated themselves together and are monopolizing the pilotage at the port of Galveston, and that such combination is in restraint of trade, all of which he claims are admitted by our demurrers to his answer, that, therefore, the defense of a violation of the anti-tr[illegible] aw of Congress passed July 2, 1890, is established.

The demurrers assumed to be true only those facts which are sufficiently pleaded, and these facts are neither more nor less than the charge that plaintiffs are partners in receipts and expenses of the service, and that they charge the fees fixed by the commissioners under the law. The exact averments of the answer in this behalf are:

"That petitioners, contriving and intending to counteract the effect of free competition in pilotage at the port of Galveston, and to lessen their labors and minimize the facilities they should offer all vessels entering and departing from said port, and to maintain arbitrarily the maximum rates of pilotage allowed by law, have associated themselves together as partners; that by reason of such association and agreement, they prevent competition and monopolize the pilotage of said port, of vessels engaged in the transportation of traffic and commerce among the several States and with foreign nations; that the combination and agreements of petitioners are in restraint of trade and commerce between the several States and with foreign nations and illegal; that the trade, traffic and commerce passing through the port of Galveston are restrained, hindered and injured by said

combination and the acts of petitioners and the fees charged by them."

To this passage we excepted because it set up no defense and was obscure and uncertain, and consisted mainly of conclusions and not statements of facts. In disposing of this issue, if it may so be termed, the Court of Appeals observed: (Tr. 19.)

"The State, as already stated, may create the office of pilot by the same act it has created the office of Commissioners of Pilots, who decide upon the qualifications of applicants for branch or deputy pilots, and who recommend to the Governor where appointments are proper, such as are meritorious etc. They may for sufficient cause upon hearing suspend a pilot or deputy and the Governor has power at will to remove or reinstate one. The entire subject is under the control of the Governor and the Commissioners. So long as they see fit to retain defendants in error in office as pilots, plaintiff in error cannot question their right to exercise their functions. The very nature of an 'office' is that it gives a monopoly of exercising the official acts pertaining thereto to the incumbent, to the exclusion of others, though equally fit. If they improperly conspire and combine, this might be conduct that would suggest their removal by the Governor, or be cause for suspension by the Commissioners. We cannot see how such acts would, while they are allowed to remain in office, in any manner affect their right to perform its duties or to protect themselves in its emoluments."

This expression is in the footsteps of the Petterson case set out in the appendix. 57 S. W., 1006.

Plaintiff in error complains that the Galveston pilots, *by reason of their association together as partners,* prevent competition, monopolize the duties and emoluments of pilots, maintain rates and restrain commerce.

The first inquiry is, how can a mere partnership accomplish these things? Let us analyze these assertions.

The necessary effect of official incumbency is that the officer shall do the work and receive the recompense, and not others; and, in this sense, every law creating an office or place and providing for the selection of those who shall discharge its duties, debars others not so appointed; so that it comes back to the question, which we will discuss later, as to the right of the State to enact such laws as ours and to provide how many pilots there shall be, and the prerequisites to their appointment.

It is hinted, however, that competition among the pilots themselves is stifled. This is impossible, for the commissioners are clothed with authority (Art. 3793) "to establish regulations respecting the stations whereat and the times wherein they (the pilots) shall be on duty." The board can and does determine what pilots and how many shall be in port to take vessels out and which of them shall be stationed outside to bring vessels in. A fair division of the work and exposure is thus made, in which the pilots themselves have no voice or control.

The charge as to cutting off competition and as to a monopoly are essentially identical. An office is necessarily a monopoly, in a certain sense, as pointed out by Judge Gill, in the opinion in Petterson vs. Board of Pilot Commissioners for Port of Galveston, and if the Governor should increase the number of pilots the facts of "exclusive right" and fees would remain.

How such a partnership violates the anti-trust law is not shown. A safe test as to what constitutes a trust or illegal combination is its ability or tendency to control prices and prevent or lessen competition. The pilot association has for its object the division among its members of the earnings and expenses. It cannot regulate fees, for they are fixed by the pilot commissioners, the statute naming the maximum. (R. S. Art. 3800).

As stated, the commissioners are required "to establish regulations respecting the stations whereat and the times wherein they (the pilots) shall be on duty, with provisions for leave of absence;

as also respecting the class, condition, number and use of pilot boats, and such other minor regulations compatible with the provisions of this title as may be needed for the government of pilots." etc. R. S., Art. 3793.

Thus, the pilots themselves have no voice in determining when or where one or more of them shall be on duty.

So that the lack of competition, if such exists, does not and cannot result from the fact that the pilots have assumed among themselves the relation of partners, as in the discharge of their duties they are under the absolute control of the board of commissioners.

A reading of the law will satisfy the Court that no restraint of commerce or prevention of competition can exist by virtue of any agreement among the pilots themselves, so that plaintiff in error is confined to a criticism of the law itself, for it alone is responsible for the limited number of pilots, and it alone prescribes the maximum rates of pilotage, and generally provides for the regulation of the service by the Commissioners who are responsible to the Governor.

It has been held that the formation of a partnership among all the pilots of the port is not unlawful, but commendable for the reason that by so doing they could relieve each other at stated hours, purchase better boats with their joint funds, and otherwise conduce to better service.

Petterson vs. Board of Pilot Commissioners, (Texas C. C. A.) 57 S. W., 1002.

Jones vs. Clifford, 5 Fla., 510.

Levine vs. Michel, 35 La. Ann., 121.

The Pirate, 32 Fed., 490.

The Dundee, 103 Fed., 698.

Affirmed in 108 Fed., 678.

Mason vs. Ervine, 27 Fed., 459.

An agreement to be in conflict with the anti-trust act must

directly and substantially, and not merely indirectly and incidentally, regulate interstate or foreign commerce.

Mr. Justice Peckham, speaking for the Court in Anderson vs. United States, 171 U. S., 615; 43 L. E., 306, observes:

"It has already been stated in the Hopkins case, above mentioned, that in order to come within the provisions of the statute, the direct effect of an agreement or combination must be in restraint of that trade or commerce which is among the several States, or with foreign nations. Where the subject matter of the agreement does not directly relate to and act upon and embrace interstate commerce, and where the undisputed facts clearly show that the purpose of the agreement was not to regulate, obstruct, or restrain that commerce, but that it was entered into with the object of properly and fairly regulating the transaction of the business in which the parties to the agreement were engaged, such agreement will be upheld as not within the statute, where it can be seen that the character and terms of the agreement are well calculated to attain the purpose for which it was formed, and where the effect of its formation and enforcement upon interstate trade or commerce is in any event but indirect and incidental, and not its purpose or object.

As is said in Smith vs. Alabama, 124 U. S., 465; 31 L. E., 508, 'There are many cases, however, where the acknowledged powers of a State may be exerted and applied in such a manner as to affect foreign or interstate commerce without being intended to operate as commercial regulations.' The same is true as to certain kinds of agreements entered into between persons engaged in the same business for the direct and bona fide purpose of properly and reasonably regulating the conduct of their business among themselves and with the public. If any agreement of that nature, while apt and proper for the purpose thus intended, should possibly, though only indirectly and unintentionally, affect interstate trade and commerce, in that event we think the agreement

would be good. Otherwise, there is scarcely any agreement among men which has interstate or foreign commerce for its subject that may not remotely be said to, in some obscure way, affect that commerce and to be therefore void.

"We think, within the plain and obvious construction to be placed upon the act, and following the rules in this regard already laid down in the cases heretofore decided in this court, we must hold the agreement under consideration in this suit to be valid."

Hopkins vs. U. S., 171 U. S.; 43 L. E., 290.

It must be a direct and substantial, and not simply an incidental, regulation of foreign commerce.

Addystone Pipe Co. vs. U. S., 175 U. S., 211; 44 L. E., 143.

If it can be conceived that the co-operation of the Galveston pilots in providing necessary boats and dividing earnings and outlay, and that the action of the Commissioners in fixing rates, times and stations for pilot duty, in any manner affects the interests of foreign traffic, it is only indirectly so, and it is clear that the effect is, or, in the nature of things ought to be, to contribute to prompt, safe and reliable handling of vessels in that trade.

Plaintiff in error does not point out, or in any matter suggest, how such an arrangement can have the tendency to hamper commerce. Upon the contrary, it is plain that such co-operation should enable the pilots to render it more prompt and efficient aid. They require steam vessels for sea duty outside the bar. It may be reasonably assumed that the means of one or a few pilots would be inadequate to the purchase of such an equipment, and it is in the interest of commerce that they should unite their earnings to this end, as well as for a more uniform apportionment of labor and benefits.

Thus the commission, as the statutes command, direct the pilots in all the details of their work, indicating who and what number shall remain upon shore in readiness to take charge of outgoing

vessels, and also those who shall be stationed in the offing to safely guide the course of incoming vessels. At times, the larger number may be needed either in port, or *vice versa*.

The anti-trust decisions of the Federal Supreme Court, cited by plaintiff in error, we do not think apply. They construe "An act to protect trade and commerce against unlawful restraints and monopolies," and hold that agreements between railroad and other companies to maintain rates and prices are unlawful, insofar as they relate to interstate commerce, although the rates and prices so fixed may be reasonable. Where is there any semblance of such an agreement in the instant cause? It could as well be claimed that the legislature could not establish any offices and provide for collection of its fees, if the duties in any way affected commerce between the States and foreign countries. What would be said of quarantine officers, public weighers and the like?

Has the State the right to limit the number of port pilots and require service as a deputy pilot as a condition precedent to appointment as pilot?

The third error assigned is that the statute of Texas abridges the privileges or immunities of plaintiff in error as a citizen of the United States, and deprives him of liberty and property without due process of law, and denies him the equal protection of the law as guaranteed by the first section of the Fourteenth Amendment of the Constitution of the United States, and under this assignment the following proposition is submitted:

"The State can not declare a trade, profession, occupation or business, to which none of the functions of government attach, to be an office, limit the number of citizens who may hold the same, and prohibit all others, whatever may be their qualifications and fitness, from pursuing such trade, profession, occupation or business. And the provisions of the Texas statute which declares a pilot to be an officer, and limits the number of citizens who can

serve as pilots to the defendants in error, and such deputies as they may choose to appoint, are void."

In disposing of this contention, the Court of Appeals of the Fourth District of Texas observes:

"Upon this subject much might be written. But in view of the universality of such laws and their long observance and enforcement in commercial countries, very little need be said. The object of such laws is to protect life and property from the perils incident to navigation.

"Steamship Co. vs. Joliffe, 2 Wall., 450.

"The subject comes fairly within the scope of governmental or police functions. We consider the case of Petterson vs. Board of Commissioners, 57 S. W., 1007, as deciding the questions raised by these assignments, against the contention of appellant."

The Petterson case referred to discusses the subject quite fully. We offer a few passages from the opinion:

"These laws were not passed for the furtherance or preservation of any individual right, but are necessarily a limitation on the rights of individuals. Their clear and manifest purpose is to secure a high order of service in a calling affecting interests of vast public and private concern. The securing of efficient pilots is not only needful in the interest of passengers and property which may be carried in ships, but the public is concerned in keeping its ports and navigable streams free from obstruction by wrecked or disabled vessels. Since the government has undertaken at public expense to maintain the depth of water in the more important ports and streams, and to keep them free from obstruction, the public concern is even greater, and the government clearly has the right and power to provide adequate means for the selection of suitable persons to perform the service. In 1789 Congress, finding that the various States whose territory touched navigable waters had enacted systems of pilotage laws, and perceiving that in the nature of things, and because of the

variant conditions existing in various ports and waters, a uniform system was unwise, if not impossible, expressly adopted such laws upon the subject as had already been enacted by the several States, and such as thereafter might be passed by them; thus relegating to the States a power which by an article of the Federal Constitution they had conferred upon Congress. For this reason the States are held in the enacting of laws upon this subject to be exercising an original power, and not one delegated by Congress. The Chase (D. C.), 14 Fed., 854. In the exercise of this power, they have been uniformly unmindful of the private right to exercise the calling of a pilot, and have unhesitatingly sacrificed such right where it appeared to stand in the way of the object to be accomplished. A like purpose runs through every article of the law in question."

A case in which public weighers acted jointly in enjoining one not holding such office from performing his duty, is that of Davidson vs. Sadler (C. C. A.), 57 S. W., 54. The court also there held that the law providing for public weighers is not unconstitutional because it deprives persons employed in public weighing before the enactment of the statute of their former means of livelihood.

Counsel for plaintiff in error contends that the position of branch pilot is not a public office, and that, therefore, the legislature can not prescribe the duties and limit the number of persons who shall enjoy the privileges attached to the position. If it be found that a branch pilot is a public officer, it would follow that the qualifications and number of persons so appointed could be constitutionally designated by the State legislature.

The statutes of Texas provide (Art. 3796) that the Governor shall appoint at each of the ports such number of branch pilots as may from time to time be necessary, each of whom *shall hold his office* for the term of two years. This is the period fixed by our constitution for terms of all offices, except where it expressly

provides otherwise. The statute further declares that in case of a vacancy *in such office*, the appointment shall be for the unexpired term only.

By Art. 3793, each pilot is required before entering into the duties of his *office*, to give bond with sureties in the sum of five thousand dollars, payable to the Governor and his successors, conditioned for the faithful performance of the duties of his *office*. The *oath of office* prescribed by the constitution must also be taken and subscribed by each pilot.

The Supreme Courts of California and Louisiana have decided that licensed state pilots are public officers as shown in Judge Gill's opinion.

Judge Gill further points out that "if the State, by imposing the duty of pilotage upon a select few, to the exclusion of the many, invades an inviolable right, does it not invade a like right when it requires the master of a vessel to pay pilotage, even if by his own skill he has brought his vessel safely into port? The public interest, as compared with the private right, is so vast, the private right must yield. A parallel in principle is found in the exercise by the State of the right to establish pest houses, and to place contagion patients in the charge of the government physicians, without reference to the wishes of the patient, thus denying to him the right to select his own medical attendant. In California the position of pilot is held to be an office, being so made by statute.

People vs. Woodbury, 14 Cal., 43.

Flynn vs. Abbott, 16 Cal., 359.

They seem to be treated as such in Massachusetts.

Doliver vs. Parks, 136 Mass., 499.

The Oregon law seems to authorize limitation as to number.

The California, 1 Sawy., 596, Fed. Cas. No. 2313.

The Indiana law seems to require bond and oath after appointment by the Governor.

Barnaby vs. State, 21 Ind., 450.

In New York the applicant is required to undergo a preliminary service for three years, during which time the board examines him three times. He then must serve as deputy for two years, after which he may be appointed by the Governor, by and with the consent of the Senate.

In Louisiana they are officers by force of the statute. See the Louisiana case supra. We have not these statutes before us, but the nature of their provisions are inferred from the cases cited."

* * *

"Courts should declare a law unconstitutional only when it is clearly so.

"Fletcher vs. Peck, 6 Cranch, 87, 3 L. E., 162.

"And a court should hesitate long to deny the power here undertaken to be exercised, in view of the practical similarity of the laws of all the States upon the subject, in view of their venerable age, during which they have either been free from a like attack or have else withstood its force, and in view of the forbearance of Congress, which at all times had the power to abrogate these laws or any objectionable feature therein."

The distinction between employments which are and which are not public offices is thus stated: "Where an employment or a duty is a continuing one, defined by rules prescribed by law and not by contract, such a charge or employment is an office." Measured by this rule the Galveston pilots are officers.

23 Am. & Eng. Encyc. of Law, 2d ed., 324, and cases cited in note 1.

The courts of last resort of Texas having held a pilot to be a public officer, this Court should adopt that construction of our statutes.

Plaintiff in error urges the novel view that the State can not declare so important an employment as that of pilot to be an office, in the constitutional and accepted sense of that term.

But the gist of the objection of the opponent, as we understand

it, is that the Texas law limits the class from whom pilots may be appointed to those who have served a probation under a pilot. (Texas R. S., Art. 3792.)

Our reply is that the legislature have the power and the right to declare what shall be necessary to qualify one for the appointment and subject to what conditions it shall be conferred. In other words, the law-making body has the right of classification.

Upon this subject our Court of Appeals in the Petterson case, with the approval of the Supreme Court, held that "it can not be urged that the requirement of service as a deputy is unwise or unreasonable, for it results in experience in the very waters in which they are afterwards to serve as pilots. The pilot is made responsible for the acts of his deputies, and he can not appoint one without examination and indorsement by the board. No better system could be devised for the securing of able and efficient men to perform the responsible and onerous service imposed;" that if this provision of the law should be abused by the pilots in recommending unsuitable persons as deputies, or in failing to recommend suitable persons in sufficient number, any person might be appointed a pilot by the Governor whom the board might find upon examination to be possessed of the other required qualifications, and that the power of the board to suspend and the Governor to remove at his will and pleasure would enable them to apply such discipline as to effectually control the appointment of deputies, if not, in fact, to name them.

And the right and duty of the pilots, subject to proper regulation by the board, to appoint their deputies who may thereafter be their successors or associates, is not an unlawful or unconstitutional delegation of authority by the legislature.

Some preliminary training for pilots is essential, and it is well nigh the universal practice in our maritime States to require a proper service as deputies or apprentices, as will appear from the statutes of those States to which we later make reference.

The case of Palmer vs. Woodbury, 14 Cal., 45, considered the validity of a provision in the pilot law of that State which required that "the candidate (for pilot) must be not only an American citizen, not under 21 years of age, but must have served two years on board a pilot boat, or have commanded a square rigged vessel in the coasting trade in and out of the harbor of San Francisco for three years," etc. Under this law a person was appointed pilot, and a *quo warranto* suit was instituted against the appointee upon the ground that he was ineligible to this place, because, first, he had not served two years aboard a pilot boat in the harbor of San Francisco, before the grant of license; and second, that he had never commanded a square rigged vessel in the coasting trade in and out of the harbor of San Francisco for three years before such grant. The Supreme Court held:

"Though by the acts of the legislature already cited, a power of appointment is given to the board of commissioners, the power is not unlimited. It does not authorize the board to appoint whomsoever it chooses to this office. A discretion is given as to the individuals to be appointed, and this discretion the courts can not control; but no discretion as to the classes from which these individuals shall be taken. The legislature has a right to declare these tests of eligibility, as well as to give the power to select.

They have declared them: 1. The appointee must be an American citizen. 2. Not under 21 years old. 3. He must have served two years on board a pilot boat or shall have commanded a square rigged vessel in the coasting trade in and out of the harbor of San Francisco.

The board, acting as a special commission, organized by act of the legislature, has just such powers as the act confers upon it. It can not transcend those powers. It must make its appointments from the classes of persons prescribed in the act. It could no more appoint a man as pilot who had not served two years or commanded a vessel than it could appoint a free negro or a woman."

This case was decided before the war and prior to the freedom of the negro.

The Fourteenth Amendment was not designed to interfere with the police power of the State, and the pilotage laws are police regulations of commerce. Congress possesses the right to establish these regulations, but as long as it does not assume this power, the States may exercise it.

In the language of Chief Justice Marshall, in Gibbons vs. Ogden, 9 Wheat, 207, "When the government of the Union was brought into existence, it found a system for the regulation of its pilots in full force in every State. The act which has been mentioned (the Act of 1789) adopts this system and gives it the same validity as if its provisions had been specially made by Congress." Will it be questioned that if Congress had taken charge of the entire subject its rights to prescribe an apprenticeship or a deputyship could be successfully challenged?

Tiedeman's Lim. of Police Power, 626.

Hughes on Admiralty, 28-38.

The China, 7 Wall., 53, 19 L. E., 67.

Wilson vs. McNamee, 102 U. S., 572; 26 L. E., 234, deciding that the pilot laws of New York, similar in principle to ours, are valid.

Legislation limited in its application, but operating alike on all persons similarly situated is not within the Fourteenth Amendment.

Barbier vs. Connolly, 113 U. S., 27; 28 L. E., 923.

The right to designate the class from which certain officers shall be selected carries with it the idea of inequality, but this fact alone does not determine the matter of constitutionality.

A. T. & S. F. Ry. vs. Matthews, 174 U. S., 106.

The Chase, 14 Fed., 854, decided by Judge Locke (S. D. Fla.), in 1882, was a case in which it was contended that the State, in framing pilot laws, acts by authority delegated or permitted by

Congress, and that the legislature, therefore, has no power to confer upon a local board or pilot commissioners the power to fix rates of pilotage. Judge Locke held that such delegation was not in conflict with Federal legislation. There was no appeal in that case.

The following cases are instances in which the State delegated to others the authority to recommend in one case, and to appoint in the other, the pilot commissioners of the ports of Boston and New York respectively:

Opinion of the Justices, 154 Mass., 603; 31 N. E., 634.

Sturges vs. Spofford, 45 N. Y., 446.

A leading case is Cooley vs. Board of Wardens, 12 How., 300; 13 L. E., 996. In considering the commerce clause of the Federal Constitution, the Court says:

"That the power to regulate commerce includes the regulation of navigation, we consider settled. And when we look to the nature of the service performed by pilots, to the relations which that service and its compensations bear to navigation between the several States, and between the ports of the United States and foreign countries, we are brought to the conclusion that the regulation of the qualifications of pilots, of the modes and times of offering and rendering their services, of the responsibilities which shall rest upon them, of the powers they shall possess, of the compensation they may demand, and of the penalties by which their rights may be enforced, do constitute regulations of navigation, and consequently of commerce, within the just meaning of this clause of the Constitution."

It will be noted that the court speaks of the regulation of the qualifications of pilots.

While it is conceded that Congress can, if it deems best, assume control of pilotage in every State, yet it is equally well settled that the mere grant to Congress of the power to regulate commerce did not deprive the States of the power to regulate pilots, unless and until Congress should determine otherwise. Thus far,

except as to coastwise steam vessels, the regulation of this subject has been left by Congress to the several States.

In *ex parte* McNiel, 13 Wall., 236; 20 L. E., 624, the holding was that pilot regulations are regulations of commerce, and that half pilotage is the necessary and usual part of every system; that State pilotage laws are constitutional and valid. We call particular attention to the terms of the New York law, thus referred to by the court:

"All appointments are required to be made upon the recommendation of the Board of Wardens of the Port of New York to the Governor, the nomination by him to the Senate of the State of the persons so recommended, and their confirmation by that body. Apprentices are required to serve three years, to be examined twice during the last year by the Board of Wardens, *and to serve two years afterwards as deputies before they can be appointed pilots.*" We italicize the last few words. The Texas law has a like provision. The court further observes:

"Pilots are a meritorious class and the service in which they are engaged is one of great importance to the public. It is frequently full of hardship, and sometimes of peril; night and day, in winter and in summer; in tempest and calm, they must be present at their proper places and ready to perform the duties of their vocation. They are thus shut out for the time being from more lucrative pursuits and confined to a single field of employment." This would seem to be a good reason for giving them the sole right to the recompense. Again, the court remarks:

"The Constitution took effect on the first Wednesday of March, 1789. Pilot laws existed in several of the States at that time, and were subsequently enacted in others. In all such States, it is believed, they have been changed from time to time, according to the will of the respective legislatures. Suits in the State courts have been founded upon them and recoveries had, and many such cases are reported. In none of them have we found

that the question was raised or a doubt expressed as to the validity of the laws or the authority of the States to enact them." A number of cases are cited by Judge Swayne. There was no dissent.

The Carrie L. Tyler, 106 Fed., 426.

The Creole, Fed. Cas. 13033.

Darden vs. Thompson, 101 Va., 635; 44 S. E., 755.

Counsel for Olsen argue that the duties of a pilot are those only of a trained seaman, familiar with the port, and not those pertaining to any governmental function.

It is not easy to define the nature of or extent of governmental control of public instrumentalities, especially those of commerce. We find that railroads, harbors and rivers are universally regarded as public highways and as subject to regulation by the State and by Congress, in certain cases.

As in the case of the locomotive engineer, Smith vs. Alabama, 128 U. S., 96; 32 L. E., 352, where a license was required, there is no doubt that the State could have prescribed further conditions than those which it did; such, for instance, as service as an apprentice.

Take the very case at bar. If the right to board a vessel and serve as a pilot in directing her safely through the intricacies of harbor navigation is a common right, can not the same thing be said of the right of any physician to board that vessel and assume to act as a quarantine officer? If he possesses knowledge and skill, he may be as well or better qualified than the officer appointed by the Governor for that purpose, but it is obvious, as the Court of Civil Appeals has so clearly demonstrated, that the public interests are involved and their representative, the State, must supervise and control, through its officers, these matters of general importance. So that it is not alone a question of skill and experience.

Again, the revenue department of the government sends men

upon board of the incoming steamer to perform certain duties of inspection. Other men may be as competent for this work as the customs officials, and, in fact, may be better able to appraise goods and make the necessary calculations and entries, and yet, on behalf of the orderly and responsible administration of government, they would not be permitted to do so, and the authority of the government to select those who should do the work has never been challenged.

Again, when the vessel reaches the wharf, an examination of hulls and boilers may be made. This is usually, if not invariably, done by officials, either of the government or of some insurance institution. The certificate of inspection of other men, well qualified though they might be, would be worthless.

Under our pilot law, defendant has the right to qualify himself and apply for appointment, but there is no obligation laid upon either the pilots to make him a deputy, or, if they should do so, upon the governor to appoint him a full pilot. A discretion is confided to these officers, and with respect to the pilots its abuse can be quickly redressed by the removal of the offender without a hearing.

The Court of Civil Appeals for the First District, in Petterson vs. Smith, 5 T. C. R., 547, which was a companion case to the present, but is not the Petterson case previously cited, the court said: "Except as to the party defendant the case is identical with the case of Olsen vs. Smith, 4 T. C. R., 982, decided by the Court of Civil Appeals at San Antonio, and every question save two presented in the briefs in this case were presented and passed on in the case cited. Since this cause was submitted our Supreme Court has refused a writ of error in Olsen's case, and we deem it unnecessary to seek to add anything to what was said in that case on the questions decided."

The two questions not included in the Olsen case were with respect to the joinder of all the pilots as plaintiffs in one suit, and

the further point that as the law gives the branch pilot offering his services the right to recover half pilotage from the vessels which refuse the services of a pilot, and $50 as a penalty from the person unlawfully piloting the vessel into the harbor, the branch pilot has no further recourse, and those choosing to violate his rights may do so, subject to the penalties prescribed and none other; and that for such reasons an injunction would not lie. The court negatived both of these contentions.

The averment that Olsen had offered his services and piloted vessels into port before any of plaintiffs had tendered their services shows, so Olsen alleges, that the pilots do not give to the public that quick and efficient service that commerce demands, and that competition might insure. The answer does not disclose under what circumstances defendant offered himself as a pilot. He could have intercepted a vessel by going far out to sea and meeting a single steamer coming from a given direction, while defendants in error, under the requirements of the law and the orders of the commissioners, were required to cruise in the proximity of the entrance to the harbor so as to be on hand and available to vessels approaching from any direction. It is not alleged that any British or other foreign ship was delayed while waiting for a pilot.

Again, defendant might have boarded a vessel at the wharf and, pretending to be a port pilot, have been employed to take her to sea. At any rate the modification of the decree of the District Court meets this complaint.

While the fact that the pilot laws of other sea-board States are similar to ours does not establish their validity, yet as it tends to show that such is almost the universal understanding we call attention to a number of them.

The laws of Alabama require a pilot to have served at least one year as an apprentice or boatkeeper of a pilot boat. Code of 1896, Secs. 2992, 2996, 2999.

In Florida, no one can be appointed a pilot unless he shall have served an apprenticeship of four years on a regular pilot boat. R. S. of 1892, Secs. 938 et seq.

In Delaware, an apprenticeship of six years on a pilot boat is required. Code of 1893, pp. 556, 558.

Georgia exacts a service of two years as apprentice on a pilot boat. Code of 1895, Secs. 1651, 1653, 1683, 1684.

In New York, apprentices must serve for three years as such, and for two years as deputy pilots. R. S. Vol. 3, pp. 2266, 2273.

No license will be granted in Virginia except after apprenticeship to a pilot of five years. Code of 1887, Secs. 1955, 1957, 1959.

The New Jersey statute prescribes that the applicant must have served as apprentice four years and three years as boatkeeper, before being licensed as a deputy. 2 Gen. Stats., Arts. 56, 59.

An apprenticeship is a condition precedent in Mississippi, but no particular time is fixed. Ann. Code, Secs. 2252, 2258, 2260, 2261.

In Maryland, at least five years' service as an apprentice in piloting is demanded. 2 Pub. Gen. Laws, Art. 74, Secs. 4, 6, 10.

An apprenticeship of three years is the law of South Carolina. R. S. of 1893, Secs. 1357-1365.

In North Carolina, the term of probation is three years. Battle's Rev., Chap. 87, Secs. 1, 7,

California has been already mentioned.

The other provisions with regard to pilot commissioners and other duties, the terms of office of pilots, and other details of the different State laws, resemble, in their general features, those of Texas.

An apprenticeship is substantially a deputyship, under our law.

It is a strong argument that these statutes have never been assailed upon any such grounds as are relied on by plaintiff in error.

The questions presented by plaintiff in error have thus far been

settled against him, if we read the law aright, and we trust this court will, after full consideration, adjudge the principles of the precedents to be with the lower court and the other courts that have determined analogous questions.

Respectfully submitted,

JAMES B. & CHARLES J. STUBBS.
Counsel for Defendants in Error, A. D. Smith et al.

APPENDIX.

The opinion of the Court of Civil Appeals of Texas in Petterson vs. Board of Commissioners of Pilots, May 24, 1900, in which case the Supreme Court denied a writ of error, is given in full:

GILL, J. This is an appeal from a judgment sustaining a general demurrer and special exceptions to a petition for mandamus. The purpose for which the mandamus was sought was to compel the board of commissioners of pilots for the port of Galveston to examine appellant as to his qualifications and fitness to act as a branch pilot, and to report their findings to the Governor of the State. Appellant's petition contained the following allegations, which he urges are sufficient, if true, to entitle him to the writ: He alleges that he is an American citizen, and has resided continuously for more than five years in the State of Texas; that he is a practical and skilled seaman, and holds license under the laws of the United States as pilot for coastwise steam vessels for the port of Galveston; that he is familiar with the harbor of Galveston, and the entrance thereto from the Gulf of Mexico, but has never been appointed a deputy pilot for the port, or served as such; that he has served for more than five years as a pilot on the United States revenue cutters on duty at said port, and is by education, training, and experience qualified in every way to act as a branch

pilot under the laws of the State of Texas; that he has repeatedly within the last two years requested appellees to examine him as to his qualifications to act as branch pilot at such port, to decide on same, and to report their findings to the Governor; that appellees refused to comply with his request, claiming that under the laws of the State of Texas they have no right or authority to examine any one for the position of branch pilot, unless the applicant has served as a deputy pilot under a branch pilot now commissioned for said port, and that no one can be examined or act as deputy pilot unless he has been appointed by one of the branch pilots, and has served as such one year. Then follows an allegation that there are only 11 branch pilots in service at the port; that they have unlawfully associated themselves together into a copartnership under the name of "Galveston Pilots' Association," for the purpose of monopolizing and controlling the pilotage of the port, and have so acted for several years; that they refuse to appoint any one as deputy who will not agree to act under and subordinate to the rules, orders, and regulations made by the association; that the refusal of appellees to examine any one except such as have been appointed by the present branch pilots as a deputy pilot, and the refusal of said pilots' association to deputize petitioner or any one else who desires to work in competition with said association, creates a monopoly in favor of the existing pilots, contrary to law, and against the rights of petitioner.

The articles of the Texas statutes (Rev. St.) bearing upon the subject provide as follows:

Art. 3790: "The Governor shall appoint with the consent of the Senate for each port whose population and circumstances shall warrant it, * * * a board of five persons of respectable standing under the denominations of 'commissioners of pilots.'" The remainder of the article prescribes their qualifications, etc., and empowers the Governor to suspend, fill vacancies, etc.

Article 3791 provides that "the board of commissioners shall be

authorized, if they deem it advisable, to examine and decide on the qualifications of any branch or deputy pilot whom they may find already appointed at the time of their organization; and it shall be their duty to examine each new applicant for the office of branch or deputy pilot, and to decide on his qualifications, recommending to the Governor, where new appointments are proper, such as are meritorious, and it shall also be their duty to examine into any case of alleged or supposed misconduct or inefficiency in branch or deputy pilots; and they shall be authorized after due hearing of accusation, testimony and defense, to suspend such pilot if sufficient cause appear, and during such suspension he shall not be allowed to exercise the functions of his office. The Governor, however, shall have power at his will and pleasure to remove any branch pilot or to reinstate any one who has been so suspended."

Article 3792 provides that the board of commissioners "shall require a certain term of residence in the State of Texas to authorize any person to exercise the functions of a branch pilot for their port or said bays; as also to establish a term of probation not exceeding one year as a deputy pilot before any person can exercise the functions of his office."

Article 3793 provides: "The board of commissioners of pilots shall have authority, within the limits provided in this title, to fix the rates of pilotage, and to establish regulations respecting the stations whereat and the times wherein pilots shall be on duty, with provisions for leave of absence; as also respecting the class, condition, number and use of pilot boats and such other minor regulations, compatible with the provisions of this title, as may be needed for the government of pilots and for the order and good effect of the proceedings of the board, of which proceedings a record shall be kept; provided, no regulation shall be adopted repugnant to the constitution."

Article 3794 provides: "The board shall be authorized and re-

quired to hear and determine all disputes that may arise respecting pilots and pilotage; to award to pilots extra compensation for extra services, * * * as also compensation for injurious loss of time incurred by pilots in waiting on vessels or by being carried off to sea on vessels by default of the master * * * when such pilot might have been landed." The remaining portions of this article fix the maximum of such compensation, and provides for appeals from the judgments of the board in such cases.

By article 3796 the Governor is authorized and required to appoint at each of the ports such number of branch pilots as may from time to time be necessary, each of whom shall hold his office for the term of two years. In case of a vacancy in said office, the appointment shall be for the unexpired term only.

By article 3797 branch pilots are required, before entering upon the duties of their office, to enter into bond with sureties in the sum of $5000, payable to the Governor and his successors in office, and conditions for the faithful performance of the duties of his office. Such bond is to be approved by the board of commissioners, and filed with the Secretary of State. The oath of office prescribed by the Constitution is also required to be taken and subscribed by each pilot, such oath to be indorsed on the back of the bond, and, together with the bond, is to be recorded in the county of the port before being forwarded to the Governor.

Under article 3798, each branch pilot may appoint two deputies, subject to examination and approval by the board, and a pilot appointing a deputy without such approval forfeits his own appointment. The board is also clothed with authority to restrict all deputy pilots from piloting vessels over a certain draught.

Article 3799 provides the penalties of suspension and dismissal for certain named acts of malfeasance.

Article 3800 fixes the rate of pilotage upon classes of vessels subject thereto, and provides that the master of a vessel refusing

the services of a pilot shall be liable to such pilot for half the rate of pilotage which he would have earned if accepted.

Article 3803 prescribes a penalty of $50 against any unauthorized person acting as branch pilot, such penalty to be recovered at the suit of any duly authorized branch pilot, brought in any court of competent jurisdiction.

The above articles are believed to be all of the Texas pilotage laws which have any bearing on the questions raised on this appeal, or which are necessary to be discussed in this opinion.

The trial court seems to have held the petition insufficient to show the plaintiff entitled to the writ (1) because under the law the position of branch pilot is an office to which the Governor has the power, in his absolute discretion, to appoint such persons, and such a number of persons, as he may consider necessary for the needs of the port, and the petition does not show that the Governor has thought it necessary to appoint a greater number than are now in service; (2) these appointments are required under the law to be made from the class of persons who have complied with the requirements as to residence in the State for the time fixed by the commissioners, and as to service as deputy pilot for the time fixed by them, and the petition does not allege the plaintiff to be one of that class.

Appellant's first, second, fourth, fifth and sixth assignments of error are thus interpreted by his proposition thereunder: "When a skilled seaman, who is by education, training, and experience mentally, morally, and physically qualified to act as pilot for the port of Galveston, applies to the commissioners to be examined as to his qualifications to act as branch pilot, the board should examine the applicant, notwithstanding the fact that he has never been appointed or served as deputy pilot for the port." Under this appellant contends that the provision empowering branch pilots to select two deputies, and providing that no person who has not served the requisite term as deputy can become a branch

pilot, is inoperative—First, because the article undertaking to empower the board to fix a term of probation for deputy pilots is void for uncertainty, and if not void for uncertainty is merely directory is unconstitutional, because it places it in the power of the pilots already serving to continue themselves in office or become their own successors by refusing to appoint deputies, or by discharging those appointed before the time of probation expires; second, the law, construed as a whole, clearly requires the board to examine and report upon every applicant, in order that the Governor, in his discretion, may appoint such persons, and such number, as the needs of the port may require, and thus accomplish the objects contemplated by the law.

While the latter clause of article 3792 is of faulty construction, we do not believe it can be held to be void for uncertainty. The sense of it seems to us very plain, and the defect complained of is so insignificant and obscure that a casual reading of the article does not disclose it. We do not deem it necessary to follow counsel for appellant in his discussion of the rules of construction. The article has stood unchanged since 1846, the date of its passage. So far as we are able to ascertain, the construction placed upon it has been uniform. No one has been misled by the defective phrase, "as also to," etc. It is not a statute which has only occasionally been called into force, but has been an active, operative statute by which the boards of pilot commissioners have been controlled, and under which the important service of pilotage has been conducted. If a graver reason were urged, the court might well hesitate to hold a statute void for uncertainty which has for so many years received a common and uniform construction, and has answered the purposes for which it was passed. If, as contended by appellant, the provision is merely directory, we fail to perceive in what respect appellant could be benefited by such a holding. Directory statutes are not void, nor may they be suspended for that reason at the suit of an individual. The question

usually arises when the validity of some official act is called in question on the ground that the statutory prerequisites have not been performed. If the statute is mandatory, the official act is invalid; if directory merely, the act may nevertheless stand. In the case at bar there are strong reasons for holding the provision directory, and this aspect of the clause will be referred to further on in this opinion.

The further contention of appellant in this connection, to the effect that the provision is directory, and therefore can not limit a prior mandatory provision which requires the board to examine all applicants, is, we think, unsound. These laws were not passed for the furtherance or preservation of any individual right, but are necessarily a limitation on the rights of individuals. Their clear and manifest purpose is to secure a high order of service in a calling affecting interests of vast public and private concern. The securing of efficient pilots is not only needful in the interest of passengers and property which may be carried in ships, but the public is concerned in keeping its ports and navigable streams free from obstruction by wrecked or disabled vessels. Since the government has undertaken at public expense to maintain the depth of water in the more important ports and streams, and to keep them free from obstruction, the public concern is ever greater, and the government clearly has the right and power to provide adequate means for the selection of suitable persons to perform the service. In 1789, Congress, finding that the various States whose territory touched navigable waters had enacted systems of pilotage laws, and perceiving that in the nature of things, and because of the variant conditions existing in various ports and waters, a uniform system was unwise, if not impossible, expressly adopted such laws upon the subject as had already been enacted by the several States, and such as thereafter might be passed by them; thus relegating to the States a power which by an article of the Federal Constitution they had conferred upon Congress. For

this reason the States are held in the enacting of laws upon this subject to be exercising an original power, and not one delegated by Congress. The Chase (D. C.), 14 Fed., 854. In the exercise of this power, they have been uniformly unmindful of the private right to exercise the calling of a pilot, and have unhesitatingly sacrificed such right where it appeared to stand in the way of the object to be accomplished. A like purpose runs through every article of the law in question, and it seems clear that when the duty was imposed to "examine each new applicant, * * * recommending to the Governor, where new appointments are proper, such as are meritorious," it was meant to provide against the recommendation of any person without the careful examination required. Of course, there is a point beyond which the lawmakers can not go in subordinating the interest of the individual to the welfare of the public, and if the petition had alleged a compliance on the part of plaintiff with the provisions as to residence and service, and had further alleged that the Governor had declared that new appointments were proper, the court would doubtless have allowed the writ to prevent the discrimination against him which would have been apparent from the allegation. He would have had the same right as another to have his name considered by the Governor, if he was found to possess the requisite qualifications. That the right of an individual to examination and appointment is not absolute is evidenced by parts of this very law which are not assailed, notably the power conferred on the Governor to limit the number of pilots in any port, being controlled in his discretion by the needs of the port; also the power of the Governor to remove any pilot for any reason, or for no reason, the language of the act being, "at his will and pleasure."

Recurring to article 3791 it seems to us to have been intended that the Governor should have both the appointing power and the discretion as to the needs of the port, the board in this latter respect being advisory. This conclusion is authorized both by

the language of the act and the object sought to be accomplished. The board resides at the port, and, being charged with the duty of appointing stations and hours for the pilots, must, in the exercise of that duty, learn the necessities of the port, and it would be their plain duty, if new or other pilots were necessary, to call the Governor's attention to the situation, and recommend suitable persons from whom he might select. The Governor might ignore their suggestions, or conclude, in the absence of suggestions, that more were necessary, in which event he could require them to furnish him with names as provided by law. To hold that the board should examine all who apply would be to compel them to do in many cases an idle and futile thing; for if no vacancy existed, and no new appointments were necessary, there could be no purpose to be accomplished by the examination. If any considerable time elapsed from the date of the examination until the appointment was necessary, the applicant might in many ways become unsuitable,—might cease to be "meritorious." The clause, "where new appointments are proper," can not be held to be meaningless. If the State had the power to limit the number of pilots at this port, the whole can stand.

Whether or not the provision, construed in connection with other parts of the law, and which together apparently make the Governor's power to appoint dependent on the appointment of deputies by pilots already in service, is constitutional, may be a graver question. The contention that it enables the pilot to perpetuate himself in office or to select his successor, thus depriving the Governor of that discretion with which the law clearly clothes him, is not without force. The mere fact, however, that a law is susceptible of perversion or abuse, can not render it invalid. Nevertheless, if the evil complained of was the inevitable effect of the law, the courts could decline to enforce it. The reasons are apparent. We think the law in its other provisions furnishes an efficient remedy for the threatened or possible wrong. In the first

place, if the clause requiring a term of service as deputy pilot be directory (and it seems to be so), the Governor or board could ignore it in case of abuse, and any person might be appointed whom the board might find upon examination to be possessed of the other required qualifications. Again, the board has power to suspend, and the Governor to remove, in such a case, and the pilots in office could be so disciplined as to compel a cessation of the abuse complained of. If the pilots in office, for the purpose of maintaining themselves in office, should adopt a system of discharging their deputies just before the expiration of the probationary period, their purpose could be easily thwarted under the power possessed by the board to fix or change the probationary period at will, and this could be done without notice, and the deputies in service thus placed in a position to be examined for appointment.

It can not be urged that the requirement of service as a deputy is unwise or unreasonable, for it results in experience in the very waters in which they are afterwards to serve as pilots. The pilot is made responsible for the acts of his deputies, and he can not appoint one without examination and indorsement by the board. No better system could be devised for the securing of able and efficient men to perform the responsible and onerous service imposed.

As to the supposed case of the simultaneous loss or destruction of all appointed pilots and deputies in one catastrophe (suggested by counsel), the law does not leave commerce helpless even in that case; for in such event his client, or any other fit person, could perform the service without fear of punishment. The penalty is only enforceable at the suit of a pilot in office. We think the law itself meets the point presented, and appellant's contention can not be allowed.

Under the eighth, ninth and tenth assignments, it is urged that the court erred in holding that the 11 branch pilots for the port of

Galveston have the right to associate themselves together for the purpose of monopolizing and controlling the pilotage of said port. In Jones vs. Clifford's Ex'r, 5 Fla., 510, it was held that the formation of a partnership among all the pilots of a port was not unlawful, but commendable, for the reason that by so doing they could relieve each other at stated hours, purchase better boats with their joint funds, and otherwise conduce to better service. Of course, the question of monopoly was not present in that case. In Louisiana pilots are distinctly held to be public officers, yet the formation among them of a partnership is permitted by statute. Levine vs. Michel, 35 La. Ann., 1121. An office is necessarily a monopoly, in a certain sense. But it is unnecessary to pass on the question here, for neither the pilots' association as alleged, nor the individual pilots, are parties to this suit, and we presume the fact was alleged to show an excuse for the failure of plaintiff to serve his probation as deputy pilot; perhaps, also, to emphasize the contention that the law was open to this abuse, and was in fact being perverted.

It is not complained that they have not appointed sufficient number of competent deputies according to the strict requirements of the law, but that for a wrong motive, and a wrong reason, they have not appointed plaintiff. The pilots in office necessarily have a monopoly. Should the Governor double the number, the fact would remain. The compensation for their services is absolutely fixed by the authorities under the law. Of course, this court can not commend the motive alleged, but the allegation can not affect the result in this case. It is not averred that the board or the Governor is concerned in this wrong purpose, or have connived at it, or have failed to remedy the evil after it was called to their attention. They have an efficient and summary remedy.

Under the eleventh assignment of error, the action of the trial court is assailed on the ground that a branch pilot is not an officer of the State of Texas—First because he exercises no function of

government, and is a part neither of the legislative, executive, nor judicial departments; second, because to every citizen is guaranteed the right to follow any lawful profession, trade, or calling, limited only by such regulations as the interest of the public may require, and the legislature cannot, under the guise of regulation, permit a few to engage in such calling to the exclusion of others; third, because by the provisions of an act of congress no person may act as pilot on coastwise steam vessels unless he have a license issued under the provisions of the federal law, and therefore, if he be a State officer, he is also a federal officer, which contravenes the provision that no person shall at the same time hold a State and Federal office.

Whether a pilot exercises any of the functions of government, and to what department he is properly assignable, are questions which we will not stop to determine. That the legislature intended to make them officers is manifest from the terms of the law. This does not seem to be controverted.

We do not think the fact that he performs a part of what were his original duties under the State law, by authority of a license issued under the federal act, militates against this holding. The Federal act does not undertake to make him a Federal officer, but merely licenses him. The act last mentioned expressly leaves undisturbed the provisions of the State law, except as to the class of vessels to which the Federal act applies.

Whether the duties of a pilot are such as the State may rightfully confide alone to a limited number of men of its own selection, to the exclusion of all others, however well qualified, seems at first glance to be very questionable, and is a point upon which we have been able to find no authority, nor are we cited to any. The vast majority of pilotage cases have arisen in the enforcement by pilots of their rights to pilotage fees, where the service was tendered and refused. These cases bear upon the present question only by analogy. The right to enforce the collection of

fees in such case has been upheld without a single exception, so far as we have been able to ascertain. In ex parte McNeil, 13 Wall, 236, 20 L. Ed., 624, the right is upheld, it being declared a necessary and usual part of every system of such provisions. The fact is noted that like provisions have obtained from an early day, and are to be found in the laws of most commercial States. The Roman law obliged the captain to take a pilot or be responsible for the damages that might ensue. The Hanseatic ordinances, the maritime laws of Sweden, the Netherlands, France, England, and ten of the States of the Union contained provisions under which a penalty was incurred if the services of a pilot were refused. The law in question is as old as the State, and contains a similar provision. Now, if the State, by imposing the duty of pilotage upon a select few, to the exclusion of many, invades an inviolable right, does it not invade a like right when it requires the master of a vessel to pay pilotage, even if by his own skill he has brought his vessel safely into port? The public interest, as compared with the private right, is so vast, the private right must yield. A parallel in principle is found in the exercise by the State of the right to establish pest houses, and to place contagion patients in the charge of the government physicians, without reference to the wishes of the patient, thus denying to him the right to select his own medical attendant. In California the position of pilot is held to be an office, being so made by statute. People vs. Woodbury, 14 Cal., 43; Flynn vs. Abbott, 16 Cal., 359. They seem to be treated as such in Massachusetts. Dolliver vs. Parks, 136 Mass., 499. The Oregon law seems to authorize limitation as to number. The California, 1 Sawy., 596, Fed. Cas. No. 2313. The Indiana law seems to require bond and oath after appointment by the Governor. Barnaby vs. State, 21 Ind., 450. In New York the applicant is required to undergo a preliminary service for three years, during which time the board examines him three times. He then must serve as deputy for two years, after which

he may be appointed by the Governor, by and with the consent of the Senate. In Louisiana they are officers by force of the statute. See the Louisiana case, supra. We have not these statutes before us, but the nature of their provisions are inferred from the cases cited. In Georgia the statute does not make them such, and, of course, they are held not so to be. Dean vs. Healy, 66 Ga., 503; Wright vs. Commissioners, 69 Ga., 350. These cases, however, were decided upon the statute, and not upon principle.

Courts should declare a law unconstitutional only when it is clearly so. Fletcher vs. Peck, 6 Cranch, 87, 3 L. Ed., 162. And a court should hesitate long to deny the power here undertaken to be exercised, in view of the practical similarity of the laws of all the States upon the subject, in view of their venerable age, during which they have either been free from a like attack or have else withstood its force, and in view of the forbearance of Congress, which at all times had the power to abrogate these laws or any objectionable feature therein. We might also refuse to disturb the law for the reason that it is conceded, for the purposes of this case, that the State has the right to limit the number who may engage as pilots at this port, the law having conferred that power on the Governor. The appellant is in this position: If the features of the law which he attacks are stricken out, the law is so crippled as to be unenforceable, or if enough remains it can not be said that the legislature would have passed it in the absence of those provisions; in which event the appellant has no standing in court, for the right he seeks to enforce is asserted under the law in question. If the law stands, he has not complied with its provisions, and a demurrer was properly sustained. The judgment of the trial court is affirmed.

We also submit the opinion of Hon. David E. Bryant, Judge of the United States Court for the Eastern District of Texas, rendered Nov. 8, 1901, in the cases of McDonald et al. vs. Steamships Eric, Lingfield and Ashmore, involving some of the ques-

tions here raised. There was no appeal taken from these judgments:

"I have no doubt as to the right of libellants to recover half pilotage. They are commissioned by the Governor of Texas as pilots of the port of Galveston, and also hold licenses as United States pilots, and certain of their number tendered their services as alleged.

"While it is clear that article 3801 of the Texas Revised Statutes, exempting certain vessels from pilotage, unless for actual services, is void because of the attempted discrimination in favor of vessels engaged in the coasting trade between Texas ports, being in conflict with section 4237 of the Revised Statutes of the United States, yet as this relates to coasters only, the rest of the act is valid in respect to vessels engaged in the foreign trade, as were those described in the present libels.

"The rule applies here, as it did in the case of Reagan vs. Farmers' Loan & Trust Co., 154 U. S., 362, that where the prime object of a statute can be fully accomplished, irrespective of an invalid section or provision, it will be upheld, and here the part of the Texas statute that applies to foreign vessels is separable from and not dependent in any manner upon that section which seeks to discriminate between coasting vessels of different States.

"The libellants as an association have a right to bring suit, although only one of them may have tendered his service as a pilot to the steamers in question to pilot them in and out of this port.

"The service is one of responsibility, requiring much skill and experience, and the pilots holding their appointments both under the general and State governments, are enabled to perform the service required of them more effectively by uniting their earnings and efforts, so as to obtain the necessary pilot boats and appliances and to be always ready for duty. I see nothing objectionable or unlawful in this, but much that is commendable.

"As to the claim that the organization is violative of the anti-

trust or anti-monopoly acts of Congress and of the legislature I can discover no foundation for it. Every one who holds an office necessarily holds it to the exclusion of some one else who may desire it and in that remote sense it may be termed a monopoly, but there is nothing in the State pilot law which is in restraint of trade. The maximum rates of pilotage are prescribed by statute, and the pilots have no control over them; their reduction rests with the pilot commissioners. Nor does it appear to me that there is any conflict between this law and the treaty of 1815, between the United States and Great Britain. That treaty stipulates that British vessels shall not be subject to any duties or charges that American vessels would not be subject to if similarly engaged, and as under our law coastwise steam vessels are exempt from compulsory pilotage, so a British vessel, if engaged in the coastwise trade, would also be exempt. That treaty provides for reciprocity in this respect. As the steamers in question, however, were not coasters, the treaty is not applicable.

"The questions have been ably presented, but none of the objections raised are such as to deny libellants the right to half pilotage, and the decree will be in their favor."